Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K–02–719 OF 2001
GOPAL SRI RAM, ZULKEFLI AND ABDULL HAMID EMBONG JJCA
23 JANUARY 2007

Contract — Sale and purchase of land — Breach — Failure to pay balance of purchase price — Whether payment of balance of purchase price was the only fundamental term of the contract — Whether plaintiff entitled to withhold the payment of the balance of the purchase price until the squatters had been cleared from the lands — Whether defendant's failure to remove the squatters as agreed would tantamount to a breach of performance of an obligation by defendant — Whether time was of essence in the performance of the contract

Contract — Formation — Subject to contract — Letter of offer to purchase land — Subject to contract — Whether formal signing of an agreement was not a condition precedent to the creation of a contract — Whether there can be a concluded contract even where the parties contemplate the execution of a more formal document — Whether there was a concluded contract despite the want of a duly executed formal agreement

The plaintiff, a developer was interested in purchasing seven plots of land in Alor Setar ('the lands'). The defendant was the registered proprietor of the lands. The plaintiff wrote to the defendant expressing its interest in the lands and the plan it had in mind to develop them if the defendant was prepared to sell them. The defendant agreed. On 1 July 1991, it wrote to the plaintiff. In its letter, it set out the terms on which it was prepared to offer the lands for sale. Some of the salient terms were: (i) 10% of the purchase price shall be paid within one month from the date of the letter; (ii) the balance of the purchase price within three months from the date of the first payment; (iii) that the cost for removing the squatters on the land shall be borne by the plaintiff and the defendant will help in solving the squatter problem; and (iv) this offer for sale is subject to the execution of a formal document. The plaintiff agreed to these terms and paid the deposit of 10% of the purchase price. Later, the plaintiff handed a sum of RM5,000 to the defendant to be paid to the squatters as compensation. The three month period within which the plaintiff was to pay the balance of the purchase price was extended by a further three months by the defendant at the former's request. In the meantime, copies of a more formal agreement were prepared and forwarded by the defendant to the plaintiff for execution but the plaintiff refused to sign because the squatters were still on the lands. Six months went by and nothing happened. The defendant then terminated the offer and the lands were subsequently sold to another company. The plaintiff instituted proceedings against the defendant. It claimed that the defendant had acted in breach of contract. At the conclusion of a trial, the High Court held that there was no binding contract between the parties. The High Court further held that the

defendant had rightfully withdrawn the offer to the plaintiff when the latter failed to pay the balance of the purchase price. The plaintiff appealed to the Court of Appeal.

Held, allowing the appeal:

(1) (per **Gopal Sri Ram JCA**) There was a concluded contract despite the want of a duly executed formal agreement. There was an offer by the defendant, it had been accepted by the plaintiff. There was consideration. There was also certainty of parties, certainty of price and certainty of the property. There were the unequivocal acts of part performance by the plaintiff in the payment of the deposit coupled with the RM5,000 meant for the squatters: *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 followed. There can be a concluded contract even where the parties contemplate the execution of a more formal document: *Rossiter v Miller* [1878] 3 App Cas 1124 and *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 followed (see paras 7, 9).

(2) (per **Gopal Sri Ram JCA**) The plaintiff could not, taking into account the surrounding circumstances, have paid the balance of the purchase price until the defendant had helped 'in solving the squatter problem' by getting them off the lands. This was not a case where the payment of the balance of the purchase price was the only fundamental term of the contract. The eviction of the squatters was an equally fundamental term (see para 25).

(3) (per **Gopal Sri Ram JCA**) The plaintiff contracted to buy the lands for the specific purpose of developing them. It was a condition of the contract that the development on the lands must commence within a year from the date of the signing of the formal agreement. In order for the development to take place, the lands must be cleared of squatters and, it is the defendant who was in the best position to do that. Hence, the plaintiff was clearly entitled to withhold the payment of the balance of the purchase price until the squatters had been cleared from the lands (see para 26).

(4) (per **Zulkefli JCA**) The letter of offer dated 1 July 1991 from the defendant to the plaintiff was not a conditional offer. Notwithstanding the said letter of offer contained terms and conditions to be complied with by the parties and a formal contract in writing was to be signed there was an enforceable contract. The parties and the property to the transaction had been identified. The price of the property had also been agreed upon. The formal signing of an agreement was not a condition precedent to the creation of a contract (see para 30).

(5) (per **Zulkefli Makinudin JCA**) The legal authority to remove the squatters still rests with the defendant as the owner of the lands. The plaintiff had been asked by the defendant to pay RM5,000 to the defendant to settle the squatter problem and the plaintiff had paid the defendant the said sum as requested. The plaintiff had also notified the defendant that in order for them to obtain the bank loan to finance the balance of the purchase price, the squatters had to be removed. As the plaintiff could not possibly obtain the bank loan due to the existence of the squatters on the lands, the failure of the defendant to remove the squatters as agreed would tantamount to a breach of performance of an obligation by the defendant (see para 32).

(6) (per **Zulkefli JCA**) The learned trial judge had also erred when he had ruled that time was of the essence in the performance of the contract when in fact the undisputed facts showed to the contrary. The defendant by its conduct in granting the plaintiff a series of extensions for the payment of the balance of the purchase price whereby the reasons for the request of the said extensions were clearly stated by the plaintiff as having had to do with the squatter problem cannot now contend that time is of essence (see paras 33–34); *Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor* [1992] 2 MLJ 68 followed.

(7) (per **Abdull Hamid Embong JCA**) The obligation on the defendant to remove the squatters was a condition precedent to the signing of the formal agreement. The non performance of it by the defendant was a death knell to the execution of that agreement. The implied assurance given by the defendant to remove the squatters had given the plaintiff a legitimate expectation to assume that the defendant would undertake its obligation (see paras 38–39).

[Bahasa Malaysia summary

Plaintif merupakan pemaju yang berminat untuk membeli tujuh plot tanah di Alor Setar ('tanah tersebut'). Defendan merupakan tuanpunya berdaftar tanah tersebut. Plaintif telah menulis kepada defendan menyatakan minatnya terhadap tanah tersebut dan dalam pemikirannya merancang untuk membangunkannya jika defendan bersedia menjualnya. Defendan bersetuju. Pada 1 Julai 1991, ia menulis kepada plaintif. Dalam suratnya, ia telah menetapkan terma-terma yang man ia bersedia untuk menawarkan tanah tersebut untuk jualan. Beberapa terma yang penting adalah: (i) 10% daripada harga belian hendaklah dibayar dalam tempoh sebulan daripada tarikh surat; (ii) baki harga belian dalam tempoh tiga bulan daripada tarikh bayaran pertama; (iii) bahawa semua kos untuk mengusir setinggan atas tanah tersebut hendaklah ditanggung oleh plaintif dan defendan akan hanya membantu dalam menyelesaikan masalah setinggan; dan (iv) tawaran jualan ini tertakluk kepada penyempurnaan satu dokumen rasmi. Plaintif bersetuju dengan terma-terma tersebut dan membayar deposit 10% daripada harga belian. Kemudian, plaintif telah menyerahkan sejumlah RM5,000 kepada defendan untuk dibayarkan kepada pihak setinggan sebagai pampasan. Tempoh tiga bulan yang mana plaintif perlu membayar baki harga belian telah dilanjutkan selam tiga bulan lagi oleh defendan atas permintaan plaintif. Sementara itu, salinan perjanjian yang lebih rasmi telah disediakan dan dikemukakan oleh defendan kepada plaintif untuk penyempurnaan tetapi plaintif enggan menandatanganinya kerana pihak setinggan masih di atas tanah tersebut. Enam bulan berlalu dan tiada apa-apa berlaku. Defendan kemudian telah menamatkan tawaran itu dan berikutan itu tanah tersebut telah dijual kepada syarikat lain. Plaintif telah memulakan prosiding terhadap defendan. Ia mendakwa defendan telah bertindak melanggar kontrak. Di akhir perbicaraan, Mahkamah Tinggi memutuskan bahawa tiada kontrak yang mengikat antara pihak-pihak. Mahkamah Tinggi juga memutuskan bahawa defendan dengan betul telah menarik balik tawaran plaintif apabila ia gagal membayar baki harga belian. Plaintif merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan:

(1) (oleh **Gopal Sri Ram HMR**) Terdapat satu kontrak yang telah disempurnakan

meskipun tiada perjanjian rasmi dimasuki. Terdapat satu tawaran oleh defendan yang diterima oleh plaintif. Terdapat balasan. Terdapat juga ketentuan pihak-pihak, ketentuan harga dan ketentuan hartanah. Tiada keraguan dalam tindakan sebahagian daripada pelaksanaan oleh plaintif dalam pembayaran deposit berserta dengan RM5,000 yang bertujuan untuk pihak setinggan:*Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 diikut. Terdapat kontrak yang disempurnakan meskipun pihak-pihak hanya berfikir dalam-dalam untuk memasuki satu dokumen yang lebih rasmi: *Rossiter v Miller* [1878] 3 App Cas 1124 and *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 diikut (lihat perenggan 7,9);

(2) (oleh **Gopal Sri Ram HMR**) Plaintif tidak mungkin boleh, dengan mengambilkira persekitaran keadaan, membayar baki harga belian sehingga defendan telah membantu 'in solving the squatter problem' dengan mengusir mereka daripada tanah tersebut. Ini bukan kes di mana pembayaran untuk baki harga belian adalah satu-satunya terma penting kontrak itu. Pengusiran setinggan itu merupakan terma yang sama pentingnya (lihat perenggan 25).

(3) (oleh **Gopal Sri Ram HMR**) Plaintif telah memasuki kontrak untuk membeli tanah tersebut untuk tujuan spesifik membangunkannya. Ia adalah syarat kontrak bahawa pembangunan atas tanah tersebut hendaklah bermula dalam tempoh setahun daripada tarikh tandatangan perjanjian rasmi. Bagi tujuan untuk pembangunan dilaksanakan, tanah tersebut hendaklah bersih daripada setinggan dan, adalah untuk defendan yang berada dalam kedudukan terbaik untuk berbuat demikian. Justeru itu, plaintif dengan jelas berhak untuk menahan pembayaran baki harga belian sehingga setinggan itu dipindahkan daripada tanah tersebut (lihat perenggan 26).

(4) (oleh **Zulkefli HMR**) Surat tawaran bertarikh 1 Julai 1991 daripada defendan kepada plaintif bukan satu tawaran bersyarat. Meskipun surat tawaran tersebut mengandungi terma-terma dan syarat-syarat yang perlu dipatuhi oleh pihak-pihak dan satu kontrak rasmi bertulis perlu ditandatangani wujud satu kontrak yang berkuatkuasa. Pihak-pihak dan hartanah yang hendak dipindahkan telah dikenalpasti. Harga hartanah juga telah dipersetujui. Tandatangan rasmi satu perjanjian bukan satu pra syarat untuk membentuk satu kontrak (lihat perenggan 30).

(5) (oleh **Zulkefli HMR**) Kuasa sah untuk mengusir setinggan masih terletak atas defendan sebagai pemilik tanah tersebut. Plaintif telah diminta oleh defendan untuk membayar RM5,000 kepada defendan untuk menyelesaikan masalah setinggan dan plaintif telah membayar defendan jumlah tersebut seperti yang diminta. Plaintif juga telah memaklumkan kepada defendan bahawa bagi memastikan mereka memperoleh pinjaman bank untuk membiayai baki harga belian, pihak setinggan hendaklah diusir. Memandangkan plaintif tidak mungkin mendapat pinjaman bank disebabkan kewujudan setinggan atas tanah tersebut, kegagalan defendan untuk mengusir setinggan tersebut sepertimana yang telah dipersetujui sama seperti melanggar pelaksanaan satu obligasi oleh defendan (lihat perenggan 32).

(6) (oleh **Zulkefli HMR**) Hakim perbicaraan yang bijaksana juga telah terkhilaf apabila beliau memutuskan bahawa masa adalah intipati dalam pelaksanaan

kontrak apabila pada hakikatnya fakta yang tidak dipertikaikan menunjukkan yang bertentangan. Defendan melalui perbuatannya membenarkan plaintif beberapa lanjutan untuk pembayaran baki harga belian sedangkan alasan untuk permintaan lanjutan tersebut jelas dinyatakan oleh plaintif untuk menangani masalah setinggan sekarang tidak boleh dihujahkan bahawa masa adalah intipati (lihat perenggan 33–34); *Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor* [1992] 2 MLJ 68 diikut.

(7) (oleh **Abdull Hamid Embong HMR**) Obligasi defendan untuk mengusir setinggan adalah satu pra syarat kepada penandatanganan perjanjian rasmi. Defendan yang tidak melaksanakannya adalah mudarat kepada penyempurnaan perjanjian itu. Jaminan tersirat yang diberikan oleh defendan untuk mengusir setinggan memberikan plaintif harapan yang sah untuk mengandaikan bahawa defendan akan melaksanakan obligasinya itu (lihat perenggan 38–39).]

Notes

For cases on breach of sale and purchase of land, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4225–4234.

For cases on subject ot contract, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3252–3258.

Cases referred to

Bank of Credit and Commerce International SA v Munawar Ali [2002] 1 AC 251 (refd)
Branca v Cobarro [1947] 1 KB 854 (refd)
Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327 (folld)
Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675 (refd)
G Percy Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyd's Rep 25 (folld)
Keng Huat Film Co Sdn Bhd v Makhanlal (Properties) Pte Ltd [1984] 1 MLJ 243 (refd)
Lim Keng Siong & Anor v Yeoh Ah Tee [1983] 2 MLJ 39 (refd)
Lin Nyuk Chan v Wong Sz Tsin [1964] MLJ 200 (refd)
Mackay v Dick [1881] 6 App Cas 251 (refd)
Motilal v Nanhelai AIR 1930 PC 287 (refd)
Niesmann v Collinridge [1921] 29 CLR 177 (refd)
Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor [1992] 2 MLJ 68 (folld)
Rossiter v Miller [1878] 3 App Cas 1124 (folld)
Royal Bristol Permanent Building Society v Bomash [1887] 35 Ch D 390 (refd)
Sinar Wang Sdn Bhd v Ng Kee Seng [2005] 2 MLJ 42 (refd)
Steadman v Steadman [1974] 2 All ER 977 (refd)
Union of India v M/s DN Revri & Co & Ors AIR 1976 SC 2257 (refd)
Von Hatzfeldt-Wildenburg v Alexander [1912] 1 Ch 284 (refd)

Legislation referred to

Contracts Act 1950 ss 53, 55

Appeal from: Civil Appeal No 21–14 of 1994 (High Court, Alor Setar)

Jagdeep Singh Deo (Karpal Singh & Co) for the appellant.
Nurul Azhani bte Shaharim (Ismael Alabas & Hashim) for the respondent.

Gopal Sri Ram JCA:

[1] This case has to do with the perennial question as to who was in breach of a contract. Of course, there is no universal answer to that question. It all depends on the nature of the particular obligation. Often it depends on the order of performance of the respective obligations and whether one obligation can be performed without cooperation from the other party to the contract. Above all, it depends on the facts and circumstances of a given case. Here are the facts of this case.

[2] The plaintiff is a developer. It was interested in purchasing seven plots of land in Alor Setar. I will refer to them simply as 'the lands'. The defendant was the registered proprietor of the lands. The plaintiff wrote to the defendant expressing its interest in the lands and the plan it had in mind to develop them if the defendant was prepared to sell them. The defendant agreed. On 1 July 1991, it wrote to the plaintiff. In its letter it set out the terms on which it was prepared to offer the lands for sale. Here are some of the salient terms (as translated):

(a) The schedule of payment of the purchase price in the sum of RM720,000 is as follows:

  (i) 10% of the purchase price within one month from the date of the letter of offer;

  (ii) The balance of the purchase price within three months from the date of the first payment;

(b) That you [the plaintiff] are to develop shop lots thereon according to the current demand for shop lots in the area;

(c) That all cost for removing the squatters on the land shall be borne by you [the plaintiff] and PKNK [the defendant] will help in solving the squatter problem;

(d) That all costs for surveying works and other works, if any, shall be borne by you;

(e) That when payment of 10% is made, all quit rent payable shall be borne by you until all lots are transferred to the purchasers;

(f) That this project shall be developed within a year from the date of signing of the letter of agreement for the project;

(h) This offer for sale is subject to your approval in signing the agreement that PKNK is preparing at the moment.

If you agree to accept the offer herein together with the terms above, kindly make payment in the sum of RM72,000 to PKNK within one month from the date of the letter of offer.

[3] The plaintiff agreed to these terms and paid the deposit of 10% of the purchase price on 28 July 1991. Later, on 11 December 1991, the plaintiff handed a sum of RM5,000 to the defendant to be paid to the squatters as compensation. **A**

[4] The three month period within which the plaintiff was to pay the balance of the purchase price was extended by a further three months by the defendant at the former's request. In the meantime, copies of a more formal agreement were prepared and forwarded by the defendant to the plaintiff for execution on 15 January 1992. But the plaintiff refused to sign. Because the squatters were still on the land. Six months went by. Nothing happened. The defendant sent reminders to the plaintiff on 9 February 1992 and 7 March 1992. Still nothing happened. The defendant then terminated the contract on 25 March 1992. **B** **C**

[5] The land was subsequently sold to another company, Valley Enterprise Sdn Bhd on 5 May 1992 for RM820,000: a hundred thousand ringgit more than the price at which it had been sold to the plaintiff. The transfer was effected on 24 June 1992. About two years later, on 19 May 1994, the plaintiff instituted proceedings against the defendant. It claimed that the defendant had acted in breach of contract. It sought to recover, inter alia, the deposit of RM72,000, a sum of RM5,000 which it had paid the defendant in respect of the squatters on the land and general damages for breach of contract. At the conclusion of a trial at which viva voce evidence was led, the learned judge held that there was no binding contract between the parties. He further held that the defendant has rightfully withdrawn the offer to the plaintiff when the latter failed to pay the balance of the purchase price. He only allowed the plaintiff's claim for refund of RM72,000 together with interest thereon and awarded half costs to the plaintiff. He dismissed all the other claims. The plaintiff has appealed to us against the High Court's decision. Those, then, are the facts. **D** **E** **F**

[6] Two questions arise from them. First, whether there was a concluded contract between the parties. The second is postulated on the first. It is this. If the answer to the first question is in the affirmative, then, was the termination by the defendant on the ground of the plaintiff's failure to pay the balance of the purchase price lawful? **G**

[7] Let me take the first issue. Learned counsel for the plaintiff argued that there was a concluded contract. He submitted that the parties were already ad idem without the need of a more formal sale and purchase agreement. The defendant's case is that there was no binding contract because the formal agreement had not been signed by both sides. I agree with the plaintiff's submission. I think there was a concluded contract despite the want of a duly executed formal agreement. Just look at the facts. You have an offer by the defendant. You have an acceptance by the plaintiff. And you have consideration. You also have certainty of parties, certainty of price and certainty of the property. And you have the unequivocal acts of part performance by the plaintiff which are referable to an existing contract between the parties (see *Steadman v Steadman* [1974] 2 All ER 977). **H** **I**

[8] In *Lin Nyuk Chan v Wong Sz Tsin* [1964] MLJ 200, Wylie CJ (Borneo) after a discussion of the authorities said (at p 205):

> All these cases illustrate the length to which a court of equity will go in seeing that an agreement which is partly performed, should be fully carried out by both parties, notwithstanding uncertainty in the terms of the agreement, and the lengths to which such a court will go to resolve these uncertainties so that full performance can be ordered.

[9] The acts of part performance in the present case are the payment of the deposit coupled with the RM5,000 meant for the squatters. Based on the authorities, there was a concluded contract in this case (see *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327). True that no formal contract of sale and purchase was ever executed. But that does not matter. There can be a concluded contract even where the parties contemplate the execution of a more formal document (see *Branca v Cobarro* [1947] 1 KB 854; *Niesmann v Collinridge* [1921] 29 CLR 177; *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284; *Lim Keng Siong & Anor v Yeoh Ah Tee* [1983] 2 MLJ 39; *Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42.

[10] I am unable to accept the defendant's argument that this is a case where the execution of the formal written agreement was a condition precedent to there being a contract. The evidence points in quite the opposite direction. And it is the defendant's own evidence at that. Look no further than the testimony of DW4, the defendant's deputy managing director at the material time. Her evidence was that the defendant would readily accept the balance of the purchase price even without a formal agreement being executed by the parties. That points to the formal agreement being an unimportant document to the contracting parties. So, objectively speaking, the parties had already made a contract and the written agreement was a mere formality. Let me now refer to two authorities which are of considerable assistance.

[11] First, there is *Rossiter v Miller* [1878] 3 App Cas 1124. A piece of land had been divided into lots and a plan of the lots had been made. On the plan the proprietors printed out several conditions on which the land might be let or sold including the price and size of each plot and the date of payment of the purchase price. It also contained a condition which stipulated that the purchaser should thereafter execute a deed embodying those conditions. The purchaser made an offer to buy and he agreed to those conditions printed thereon. The vendor's agent accepted the purchaser's offer. The House of Lords held that there was a binding contract between the parties despite the fact that a formal deed had not been executed. Lord Blackburn said:

> But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared embodying the terms which shall be signed by the parties does not by itself show that they continue merely in negotiation. *It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not.* But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is complete. (Emphasis added.)

[12] Second, *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25. That was a case in which the like question as in present instance arose, namely, whether the parties had made a binding contract. Steyn LJ (as he then was) said that

in such a case as the present, 'the governing criterion is the reasonable expectations of honest men', and that 'the yardstick is the reasonable expectations of sensible businessmen'. A

[13] I have construed the evidence in this case in its totality. I have applied the yardstick of the reasonable expectation of sensible businessmen to the facts. And in consequence I am driven to the conclusion that the plaintiff and defendant in the present case had really come to a final agreement even in the absence of the formal agreement which the defendant had sent to the plaintiff. In my judgment any other conclusion would be contrary to business commonsense and would cut across the reasonable expectations of honest men. B C

[14] Having come to the conclusion that there was a concluded agreement, I now turn to the second issue: whether the defendant was in breach of contract. The defendant's case is simple enough. It is this. The plaintiff failed to pay the balance of the purchase price within the stipulated time - to recall, six months - and was in breach of its fundamental obligation. Hence, the defendant was justified in what it refers to as revoking the offer. In truth, of course, it was terminating the contract. The plaintiff, on the other hand, says that it did not pay the balance because the defendant had breached its obligation to assist in removing the squatters. Which of these rival contentions is correct depends on the construction of the contract. Before I address this point, I think it useful to recall the modern approach courts adopt to contractual interpretation. D E

[15] Over the years, courts have fashioned for themselves guidelines that are useful to construe contractual obligations. Sometimes these are referred to as 'rules'. But they are not rules at all. They are mere guidelines. Thus, *Chitty on Contracts* (28th Ed) Vol 1 p 604 says: F

> ... the modern approach to construction is 'to assimilate the way in which (contractual) documents are interpreted by judges to the common-sense principles by which any serious utterance would be interpreted in ordinary life'. As a result, most rules of construction are nowadays better regarded merely as guidelines or assumptions as to what the court may regard as the normal use of language and which assist judges to arrive at a reasonable interpretation of the parties' intentions, though subject to examination of the relevant circumstances surrounding the transaction. G

[16] In *Bank of Credit and Commerce International SA v Munawar Ali* [2002] 1 AC 251 at p 281, Lord Clyde said that the exercise of contractual interpretation: H

> is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances

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[17] In *Union of India v M/s DN Revri & Co & Ors* AIR 1976 SC 2257, Bhagwati J said:

> It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and

other documents. The meaning of such contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation.

[18] It is a guideline to contractual interpretation that a court is not confined to look only at the formal contract. It is entitled to take into account the circumstances surrounding the making of the contract, including the factual matrix that forms the background to the contract (see *Keng Huat Film Co Sdn Bhd v Makhanlal (Properties) Pte Ltd* [1984] 1 MLJ 243. Essentially the approach is objective. The court is not concerned with the subjective intention of the parties. It is their imputed intention that is relevant. Lord Clyde in *Bank of Credit and Commerce International SA v Munawar Ali* put the approach in this way:

> The knowledge reasonably available to them (the parties to contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement.

[19] Bearing in mind the approach that the authorities have established, I now turn to the facts of the present case. The first fact to be borne in mind is that the defendant was at the material time the registered proprietor of the lands. Hence it was only the defendant which had the legal right to take the necessary action to evict the squatters. That right was not with the plaintiff as it was not the registered proprietor of the lands. It had no right, title or interest in the lands to bring an action for ejectment against the squatters. All that it was obliged to do was to pay a sum of RM5,000 as compensation. That it did. It paid that sum to the defendant who paid it over to the squatters. But the squatters, having received the money, continued in occupation. According to the terms of the contract — to quote — 'That all cost for removing the squatters on the land shall be borne by you (the plaintiff) and PKNK (the defendant) will help in solving the squatter problem.' The plaintiff had met its obligation by meeting the cost for removing the squatters. It was therefore incumbent upon the defendant to 'help solve the squatter problem'. They only way it could 'help solve the squatter problem' was to evict them from the lands. As I have already said, it is only the defendant who could do that. But it did not do that. That is why the squatters remained on the lands.

[20] There is no dispute that that the defendant was aware that the plaintiff would seek financing to purchase the lands and to develop it. Yet no action was taken by the defendant - apart from disbursing the RM5,000. It was aware of the plaintiff's predicament that no financial institution would finance the plaintiff to purchase and develop the lands for so long as the squatters remained on the lands.

[21] Now, it is settled law that a promisee is under a duty to cooperate with the promisor in ensuring that the promisor's obligation is duly carried out. As Lord Blackburn said in *Mackay v Dick* [1881] 6 App Cas 251 at p 263: **A**

> I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there maybe no express words to that effect. What is the part of each must depend on circumstances. **B**

[22] So, in *Motilal v Nanhelai* AIR 1930 PC 287, the Privy Council dealt with the duty of a vendor under a contract for sale the completion of which was subject to certain conditions. The board held that it is implied that in such a contract that the vendor will do all things necessary to give effect to the agreement. On the facts of that case, the Judicial Committee held that it was the duty of the vendor to apply for sanction for transfer of the cultivating rights in the subject land to the revenue officer though such duty was never stipulated in the written contract with the purchaser. The duty was implied in order to give effect to the contract. **C** **D**

[23] The case at hand is analogous to *Royal Bristol Permanent Building Society v Bomash* [1887] 35 Ch D 390. There, the plaintiffs were mortgagees of two leasehold houses at Penarth. In exercise of their power of sale the houses were put up for sale by auction on the 14 October. The particulars said that the houses were currently occupied by the mortgagor, one Mr Fleming and that the purchase was to be completed on 11 November. The houses were purchased by the defendant and he agreed to the conditions annexed, signed an agreement and paid the deposit. He nevertheless refused to complete the purchase until he could have actual possession. The plaintiffs brought an action of ejectment against Fleming only on 10 November. The plaintiffs offered to give possession on 12 December. The defendant refused until he was paid compensation for the loss of the tenant. The court held that the defendant was entitled in the circumstances to claim from the plaintiffs to exercise their rights as the vendors to turn out Fleming and deliver vacant possession to him. It was further held that the failure of the plaintiff to give vacant possession at the time when the contract ought to be completed rendered the defendant obtaining something less from what he had contracted for. For those reasons, the court awarded compensation to the defendant. If the defendant Bomash was entitled to hold back the payment of the balance of the purchase price pending vacant possession it is difficult to see how the plaintiff in the present instance could be held in breach of contract. **E** **F** **G** **H**

[24] I also consider s 55 of the Contracts Act 1950 to be relevant to the case before us. The section reads: **I**

> When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, the promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which the other party may sustain by the non-performance of the contract.

[25] Apply that here. It is quite plain that the plaintiff could not, taking into account the surrounding circumstances, have paid the balance of the purchase price until the defendant had helped 'in solving the squatter problem' by getting them off the lands. Unlike *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675, this is not a case where the payment of the balance of the purchase price was the only fundamental term of the contract. Having regard to the surrounding circumstances, the eviction of the squatters was an equally fundamental term.

[26] It is plain that the plaintiff contracted to buy the lands for the specific purpose of developing them. It made this clear in its letters of 12 September 1990 and 8 December 1990 written to the defendant. In fact it was a condition of the contract that the development on the lands must commence within a year from the date of the signing of the formal agreement (see para 1(f) of the letter of 1 July 1991). In order for the development to take place, the lands must be cleared of squatters. And, it is the defendant who was in the best position to do that (see *Royal Bristol Permanent Building Society v Bomash*). Hence, the plaintiff was, in my judgment, clearly entitled to withhold the payment of the balance of the purchase price until the squatters had been cleared from the lands.

[27] A second reason given by the defendant for terminating the contract was the plaintiff's refusal to sign the formal agreement. I have already dealt with this point earlier in this judgment when dealing with the first issue. All I need say here is that the justification offered by the defendants in support of this ground of termination is unsustainable because of DW4's evidence.

[28] In my judgment, having regard to the objective facts and to the oral and documentary evidence, it is crystal clear that the defendant was in breach of contract when it purported to revoke or terminate its letter of offer of 1 July 1991. The plaintiff is accordingly entitled to damages for breach of contract. For the reasons already given, I am respectfully unable to agree with the High Court's findings and conclusions. I would therefore allow the appeal and set aside all the orders save the order directing the refund of the deposit. In their stead, I would enter judgment for the plaintiff for damages for breach of contract. Such damages shall be assessed by the senior assistant registrar of the High Court to whom I would remit this matter. Since this is a fairly old matter, I would direct that the suit be mentioned before the senior assistant registrar on the earliest available date with a direction to fix an early date of hearing for the assessment. The defendant must pay all the costs of the plaintiff both here and in the High Court. The deposit shall be refunded to the appellant/plaintiff.

Zulkefli JCA:

[29] I have read the judgment in draft of my learned brother, Gopal Sri Ram JCA. I agree with the views expressed and the orders made by his lordship in allowing this appeal by the plaintiff. It is my respectful view the High Court fell into error in

construing there was no concluded contract entered into between the plaintiff and the defendant. I would like to herein deal with some of the issues raised in this appeal in support of the judgment as follows:

[30] I am of the view that the letter of offer dated 1 July 1991 from the defendant to the plaintiff is not a conditional offer as contended by the defendant. Notwithstanding the said letter of offer contained terms and conditions to be complied with by the parties and a formal contract in writing is to be signed, I would still find based on the facts and circumstances of this case there was an enforceable contract. It is to be noted that the parties and the property to the transaction have been identified. The price of the property has also been agreed upon. The formal signing of an agreement in my view is not a condition precedent to the creation of a contract (see the case of *Charles Grenier Sdn Bhd v Lau Wing Hong*).

[31] As an enforceable contract had been in place vide the said letter of offer, the next question to be considered is whether the termination of the same by the defendant was valid. On this point we have to see whether there have been compliance by the parties of the terms stipulated therein. In this regard it should be noted that the plaintiff had duly paid the ten percent of the purchase price as required vide cl (a)(i) of the said letter of offer. The plaintiff had in fact commissioned a feasibility study for the development of shop lots on the said lands. A major issue that has been raised in this appeal is on the proper interpretation to be placed on cl (c) of the said letter of offer which would assist us in ascertaining which of the two parties is to perform the obligation stated therein. Clause (c) reads as follows:

> That all costs for removing the squatters on the land shall be borne by you [the plaintiff] and PKNK [the defendant] will help in solving the squatter problem. [as translated].

[32] Even though the said cl. (c) is loosely worded in the above manner, in my view the legal authority to remove the squatters still rests with the defendant as the owner of the said land. Following from there it is noted that the plaintiff had been asked by the defendant to pay RM5,000 to the defendant to settle the said squatter problem and the plaintiff had in fact paid the defendant the said sum as requested. The plaintiff had also notified the defendant that in order for them to obtain the bank loan to finance the balance of the purchase price, the squatters had to be removed. It is my judgment that as the plaintiff could not possibly obtain the bank loan due to the existence of the squatters on the said land, the failure of the defendant to remove the squatters as agreed would tantamount to a breach of performance of an obligation by the defendant (see s 53 of the Contracts Act 1950).

[33] The learned trial judge in my view had also erred when he had ruled that time was of the essence in the performance of the contract when in fact the undisputed facts showed to the contrary. On this point, it is noted that the plaintiff had paid the initial ten percent payment as required within one month of the letter of offer on 28 July 1991. The plaintiff was supposed to pay to the defendant the balance sum within three months after payment of the first ten percent. The plaintiff however vide a letter dated 6 October 1991 and an undated letter sent on 16 November 1991 requested for an extension of time of a further three months (see pp 212 and 218 of

A appeal record). The plaintiff categorically stated that this was due to the delay in their obtaining approval from the bank for the loan as a result of the squatter problem. The defendant vide a letter dated 3 December 1991 agreed to extend time as requested. The plaintiff had requested for a further extension vide a letter dated 8 March 1992 but the defendant refused and requested for payment vide its letter B dated 17 March 1992. Subsequently, vide a letter dated 25 March 1992 the defendant terminated the offer to sell the said land.

[34] It is my view that the defendant by its conduct in granting the plaintiff a series of extensions for the payment of the balance of the purchase price whereby the C reasons for the request of the said extensions were clearly stated by the plaintiff as having had to do with the squatter problem cannot now contend that time is of essence (see the case of *Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor* [1992] 2 MLJ 68). The defendant in all the circumstances of this case was wrong to have terminated the offer to sell the said land to the plaintiff and clearly was in breach D of its contractual obligations. Accordingly, I would allow the appeal.

Abdull Hamid Embong JCA:

E **[35]** I have read the judgment in draft of my learned brother Gopal Sri Ram, JCA and wish to state my concurrence with his Lordship's findings on both the issues apropos this suit, namely, that a valid binding contract had been entered into by both parties despite the non signing of a formal written agreement; and that the obligation to remove the squatters on the lands, rests squarely on the defendant (PKNK).

F **[36]** I will say no more on the first issue as this has been comprehensively and clearly dealt with in the judgment of my learned brother.

[37] As regards the disputed second issue, ie the obligation to remove the squatters from the lands, each party had contended that the other was duty bound to discharge G that obligation. The dispute turns on the construction of the condition as found in cl (c) of the terms of the contract which states:

> (c) Semua kos untuk mengeluarkan setinggan di atas tanah tersebut hendaklah dibiayai sepenuhnya oleh tuan, dan *PKNK akan membantu untuk menyelesaikan masalah setinggan* H *tersebut.* (Emphasis added.)

The latter part of that clause translates to 'that PKNK will help in solving the squatter problem'. In my view the word 'membantu' here cannot be interpreted as merely 'to collaborate or cooperate with' or just 'to give a helping hand to'. In the context of the facts of the case, it is clear that what the parties intended is for the I defendant to undertake the exercise of removing the squatters from the lands. This is borne out from the facts of the case and telling as to the state of minds of the parties, was the evidence of PW1 and PW2.

[38] The former had stated that:

Benar pihak defendan telah memberitahu saya masalah setinggan akan diselesaikan dengan saya membayar gantirugi sebanyak RM5,000. Selepas kami membayar RM5,000 tersebut pihak defendan tidak menyelesaikan masalah setinggan tersebut.

PW2 in his evidence said that:

The plaintiff company agreed to buy the property on the undertaking that the defendant will help us in clearing the squatters. By helping us in clearing the squatters, I mean the defendant will clear the squatters before we sign the agreement to buy.

PW2 further stated:

They said they would help to clear the squatters. They said it would be easier for them to deal directly with the squatters.

In my view, this obligation on the defendant is clearly a condition precedent to the signing of the formal agreement. The non performance of it by the defendant was a death knell to the execution of that agreement.

[39] I would also hold that the implied assurance given by the defendant to remove the squatters had given the plaintiff a legitimate expectation to assume that the defendant would undertake its obligation. I would also draw such an inference from the above stated facts.

[40] Apart from that, only the defendant as the registered landowner in possession of the lands may take the legal steps to evict the squatters.

[41] The facts show that the defendant was made aware that the bank loan applied for by the plaintiff would only be approved if the lands were free of any squatters. The defendant thus cannot now advance the reason that the plaintiff had failed to pay up the balance of the purchase price to terminate the contract. The loan approval was tied up to the removal of the squatters from the lands. Their removal is, in turn, the responsibility of the defendant. The defendant must not be permitted to approbate and reprobate on this, its fundamental obligation.

[42] For these reasons, I too would allow this appeal in the terms as already stated by my learned brother in his draft judgment.

Appeal allowed.

Reported by Peter Ling